We must recognize that the law is in a constant state of progress. As the ethical and moral ideals of the nation change, so must the laws, the expression of these ideals, change. The judges, by their training and by their constant contact with the law are best fitted to give expression and effect to the people's will. They are far less liable than the legislature to be swayed by political influence, and far less liable to be misled by the press and the biased and extreme views of agitators.[21] "The study of justice leads to the love of justice, and they are the first to recognize and sanction the improving customs of life."[22] "Nor is there any danger in allowing them that power which they have in fact exercised, to make up for the negligence or incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature."[23]

In making these changes the judges should move slowly. Radical or abrupt changes should be left to the legislature. But the judges should endeavor to keep the law abreast of the times. When a rule of the common law is found to be antiquated, when it no longer brings about justice as conceived and desired by the people, then the judges, in the absence of help from the legislature, should discard the rule and formulate one more in accordance with the needs of the present hour. It is only in this way that respect and reverence for the law can be maintained, for the people cannot respect or reverence that which does not represent the ethical and moral standards of their age.[24]

LIABILITY OF MUNICIPAL CORPORATIONS AND QUASI CORPORATIONS FOR INJURIES RESULTING FROM NEGLIGENCE IN MAINTAINING PUBLIC PARKS.[1]

There is a considerable conflict of authority on this topic.[2] According to the somewhat strict view obtaining in New Eng-

[21] "Judges as Law Makers," by C. T. Bonaparte, 23 Green Bag, 507.

[22] Carter, Law, its Origin, Growth, and Function, pp. 324, 335.

[23] Austin, Jurisprudence, p. 224.

[24] See "The Law and the Judges," by A. L. Corbin, Yale Review, January, 1914.

[1] See comment on the liability of a municipal corporation for negligence in the administration of its duties in 20 YALE LAW JOURNAL, 571.

[2] 25 Harv. Law Rev. 568.

land, which has come down from *Russell v. Men of Devon*[3] and the statement of Ashurst, J., that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience," there is no liability of either towns or cities for injuries resulting from negligence in maintaining public commons or parks, the only duty in the premises being a corporate duty imposed for the public benefit.[4] In some jurisdictions, however, there is liability on the part of a municipal corporation where the duty was imposed with its consent.[5] But an act of the legislature changing a town into a city has not been considered as enlarging civil remedies for neglect of corporate duty.[6] The majority of courts, on the other hand, hold that a municipal corporation is liable in this respect.[7] Some adhere to this view on the ground that the parks are the private and exclusive property of the city, in which the state, as distinguished from the municipality, has no property interest whatever;[8] others, on the ground that where the state imposes a ministerial duty on a distinct municipality or where such duty arises from the common relations of life, it must be carefully discharged.[9] Probably the best statement of the ground for this holding is that "the city has entered into relations which are within the scope of private law, namely, control and ownership of property, and it should be subject to the obligations usually attending such relations;" for, although the property is held for a public purpose, the corporation does not act as an agent for the government and is not clothed with sovereignty in respect to it.[10]

Although this class of cases falls within the range of the broad term "governmental" as formerly applied by way of distinction from that class arising from the activities of a municipal

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[3] 2 T. R. 661, 667.

[4] *Clark v. Waltham*, 128 Mass. 567.

[5] *Jones v. New Haven*, 34 Conn. 1.

[6] *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332.

[7] *Canon City v. Cox*, 55 Colo. 264; *Denver v. Spencer*, 34 Colo. 270, 7 Am. & Eng. Ann. Cas. 1042, 114 Am. St. Rep. 158, 2 L. R. A. (N. S.) 147; *Pennell's Adm'r v. Wilmington*, 7 Pen. (Del.) 229; *De Agramonte v. Mount Vernon*, 123 App. Div. (N. Y.) 717; *Silverman v. New York*, 114 N. Y. Supp. 59; *Barthold v. Philadelphia*, 154 Pa. St. 109; *District of Columbia v. Woodbury*, 136 U. S. 540; *Barnes v. District of Columbia*, 91 U. S. 540.

[8] *Denver v. Spencer*, supra.

[9] *Pennell's Adm'r v. Wilmington*, supra.

[10] 25 Harv. Law Rev. 646.

corporation as a private owner, nevertheless these cases arise from activities carried on primarily for the benefit of the inhabitants of the particular locality not strictly governmental in their nature and better denominated municipal functions, as distinguished from purely governmental functions on the one hand and private commercial functions on the other.[11] Liability on the part of a municipal corporation in respect to them is desirable and in accord with public sentiment.[12] Nor is there any apparent reason why liability under this head should not extend as well to towns which, at the present time, in almost all instances, have corporate capacity and the power of taxation. Counties, though created by the legislature for the purpose of a more convenient and distributive administration of government, and clothed with some of the attributes of sovereignty, are liable for torts, where there is a direct injury to property rights, on the ground that even a branch of the sovereign power cannot be created free from liability for the violation of the constitutional rights of individuals, notwithstanding the injury results from the exercise of a governmental function.[13] So much more should towns be liable for negligence in the exercise of their municipal functions. They hold property in much the same manner as cities do for municipal purposes. The town common to all intents and purposes is as much the exclusive property of the town as the parks are of the city, and the state certainly has no more property interest in the one than in the other. The mere fact that towns have not in the past been charged with liability for negligence in the exercise of this municipal function should not be an insuperable objection to holding them liable in the future. The holding in *Russell v. Men of Devon*[14] does not apply to any public body having a corporate fund, or the means of obtaining one.[15]

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[11] Beale's Cases on Municipal Corporations, 601.
[12] 15 Harv. Law Rev. 736, 737.
[13] 22 Harv. Law Rev. 54.
[14] Supra.
[15] Dillon on Municipal Corporations, 5th ed., 1639.